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No. 80-1690

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN MEDICAL ASSOCIATION, CONNECTICUT STATE MEDICAL SOCIETY, NEW HAVEN COUNTY MEDICAL ASSOCIATION, INC.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

JOINT REPLY TO THE BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The "Brief for the Federal Trade Commission in Opposition" ("Opposition") distorts both the facts and the issues in an effort to suggest that this Court should not hear this case. In fact, however, this case presents two legal questions of national importance:

1. Has Congress given the FTC jurisdiction over non-profit professional associations?

2. Do the antitrust laws permit the FTC to disapprove responsible efforts at professional self-regulation in accordance with *Bates* v. *State Bar of Arizona* with-

[1] The statement required by Supreme Court Rule 28.1 is set forth at p. ii of the Joint Petition For A Writ of Certiorari.

out any analysis of the competitive significance of these efforts?

These issues are appropriate for resolution by this Court.

I. HAS CONGRESS GIVEN THE FTC JURISDICTION OVER NON-PROFIT PROFESSIONAL ASSOCIATIONS?

The FTC argues (a) that the jurisdictional issue is "fact-bound" (Opposition, p. 11) and (b) that the appellate court's decision on this point does not conflict with *Community Blood Bank* v. *FTC*, 405 F.2d 1011 (8th Cir. 1969) (Opposition, pp. 14-15). Neither argument has merit.

The jurisdictional issue comes down to whether the Second Circuit correctly construed § 4 in holding that a non-profit professional society is an "association . . . which is organized to carry on business for its own profit or that of its members" within the meaning of § 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. Resolution of this issue depends on analysis of the language, policy, and legislative history of that section.[2] It does not require a detailed inquiry into the structure and activities of particular professional societies—as the Commission itself recognized by tying its proceeding against the American Dental Association to this case without any factual finding about the ADA.[3]

[2] Contrary to the FTC's argument (Opposition, pp. 15-16), petitioners are not relying on legislative history to "freeze the coverage of a broadly worded business regulatory statute." Rather, they are using it to *illuminate* a carefully defined limitation on the jurisdiction of the FTC. Since no such limitation appears in the Sherman Act, the FTC is incorrect in claiming that "petitioners' reasoning would have prevented this Court from ruling as it did in *Goldfarb* and *Professional Engineers*" (Opposition, p. 16).

[3] Also contrary to the FTC's argument (Opposition, p. 13), decisions holding trade associations subject to Commission jurisdiction do not control this case. On the contrary, the legislative history of § 4 demonstrates that Congress intended to give the agency authority over trade associations of manufacturers or dealers, but not over professional societies.

Moreover, the standard applied by the Second Circuit here conflicts with that formulated by the Eighth Circuit in *Community Blood Bank.* The Second Circuit held three medical associations subject to FTC jurisdiction by framing the test of § 4 in terms of whether they "serve both the business and the non-business interests of their member physicians." 638 F.2d 443, 448 (Appendix A, at 9a). In *Community Blood Bank,* by contrast, the Eighth Circuit held a hospital association and a blood bank to be outside FTC jurisdiction by framing the test of § 4 in terms of whether they engage "in business for *profit* within the traditional and generally accepted meaning of that word", 405 F.2d at 1017 (emphasis in original). The meaning of the word "profit" suggested by the Commission and adopted by the Eighth Circuit is whether an entity "is engaged in some undertaking for the purpose of realizing gain which will ultimately be distributed to the shareholders or members." *Id.,* at 1016.[4]

The results in the two cases demonstrate the conflict. Since the hospital association and blood bank in *Community Blood Bank* were "in the broadest sense exceedingly profitable for the doctors and the hospital" and "performed very valuable services" for their members, 70 F.T.C. 728, 863-864, they would be subject to FTC jurisdiction under the Second Circuit's formulation of the test of § 4. Similarly, since petitioners here do not seek to realize gain for distribution to their members, they would be beyond FTC jurisdiction under § 4 as construed by the Eighth Circuit.

[4] The only relevant factual inquiry under § 4 as construed in *Community Blood Bank* is to determine whether, apart from matters of form, a non-profit association is in fact operated in a non-profit manner or whether it is really a sham to pass pecuniary gain through to shareholders or members. 405 F.2d at 1019-1020. Here there is no question that petitioners are *bona fide,* non-profit organizations.

In short, whether Congress has given the FTC jurisdiction over professional associations is a question of law as to which the Second and Eighth Circuits are in conflict. As the Opposition tacitly acknowledges, this question is one of great importance in view of the Commission's extensive and continuing efforts to apply the nebulous standard of § 5 of the Federal Trade Commission Act to a wide variety of self-regulatory efforts in several professions. Accordingly, the jurisdictional issue should be considered by this Court.

II. DO THE ANTITRUST LAWS PERMIT THE FTC TO DISAPPROVE RESPONSIBLE EFFORTS AT PROFESSIONAL SELF-REGULATION IN ACCORDANCE WITH *BATES* V. *STATE BAR OF ARIZONA* WITHOUT ANY ANALYSIS OF THE COMPETITIVE SIGNIFICANCE OF THESE EFFORTS?

The FTC does not deny that it disapproved the AMA's 1976 guidelines without any analysis of their competitive significance. Rather, it argues that its condemnation of the 1976 guidelines was a proper exercise of its remedial discretion " 'to protect the public from a continuation of the harmful and unlawful activities' " found to violate the Federal Trade Commission Act (Opposition, p. 18, citing *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 48 (1960)). Thus it contends that "there is no reason for this Court to review the assessment of the record by the Commission and the court below." *Id.* at 20.

Initially, the Commission is disingenuous in characterizing its disapproval of the 1976 guidelines as simply a means of protecting the public from "continuation" of conduct found to be unlawful.[5] As this Court noted in *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 369 (n.20) (1977), the 1976 guidelines are far more than a restatement or a continuation

[5] The Commission's suggestion that the AMA sought to enforce the disavowed statements from 1971 even after issuance of the 1977 *Opinions and Reports* (Opposition, pp. 6-7) is simply wrong.

of positions in the 1971 *Opinions and Reports*. To the contrary, they are a responsible effort at professional self-regulation in light of *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975)—an effort which the FTC has condemned without proper antitrust scrutiny (Appendix B, at 355a-356a, 362a-363a).

Consequently, there are extremely important reasons for this Court to review this case. Specifically, as noted in the Petition (pp. 18-22), the Commission's disapproval of the 1976 guidelines directly undercuts *Bates, National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), and other decisions of this Court which have upheld responsible professional self-regulation.[6] *Quite significantly, the Opposition does not even attempt to argue to the contrary.* In these circumstances, the Commission must not be permitted to downplay its actions and avoid Supreme Court review of this important issue by characterizing its disapproval of the 1976 guidelines as remedial discretion to prevent reassertion of abandoned positions (Opposition, pp. 19-20).

[6] The Commission suggests (Opposition, pp. 20-21, n.16) that its order does not undercut professional self-regulation because, as modified by the Court of Appeals, it permits the AMA to adopt guidelines with respect to representations which the Association "reasonably believes" to violate § 5. What the Commission does not suggest, however, is how this provision works in view of the agency's explicit disapproval of guidelines already promulgated by AMA to address practices it reasonably believes to be false or deceptive.

CONCLUSION

For the foregoing reasons as well as those set forth in the Petition, petitioners ask this Court to issue a writ of certiorari and uphold the efforts of the medical profession to establish responsible ethical standards in the public interest.

Respectfully submitted,

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